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Leah Werchick

American University Washington College of Law

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Prospects for Justice in Rwanda's Citizen Tribunals

by Leah Werchick*

For the past seven years, Rwanda has struggled, through domestic trials, to bring to justice the massive number of persons who took part in the 1994 genocide. The Rwandan government now plans to establish over 10,000 community-based tribunals, composed of ordinary citizens, to try those suspected of committing crimes during the Rwandan genocide. While this new system, known as "gacaca," is presented as an updated form of an indigenous conflict resolution practice of the same name, it raises various due process concerns and has a substantially different function and authority. The Rwandan government expects the gacaca tribunals to begin operating some time in 2001.

Background

In December 1996, Rwanda began to hold domestic genocide trials under the newly passed Organic Law No. 8/96 of 30 August 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990 (Genocide Law). The Genocide Law created four levels of offenses: Category 1 for planners, inciters, and leaders, and for particularly brutal or notorious killings, and acts of sexual torture; Category 2 for authors and accomplices of homicides; Category 3 for assault; and Category 4 for offenses directed at property only. Category 1 offenses are punishable by death; Categories 2 and 3 by sentences of up to life imprisonment; and Category 4 by civil damages or nominal prison sentences.

By the end of 2000, Rwandan courts had handed down judgments with respect to 3,343 people accused of participation in the genocide. Between 1997 and 2000, acquittals have increased from 6 percent to 20 percent, and death sentences have decreased from 36 percent to 14 percent. Although significant due process concerns still exist, particularly those stemming from inadequate resources for reasonably speedy trials, local and international non-governmental organizations (NGOs) have described the trials as increasingly fair. Nonetheless, at the current rate, it could take as much as an estimated 113 years to try the approximately 110,000 genocide suspects remaining in detention in Rwanda's 19 prisons and 154 local lock-up cells. Moreover, an estimated 18,000 to 40,000 suspects have been detained for years without even being charged, and others have already served more time than the maximum prison sentence they would receive if convicted.

Prior efforts to address some of these problems through programs including pre-trial detention hearings and the humanitarian release of extremely old, young, or ill detainees have been inconsistently implemented. For example, in an April 26, 2000, report entitled "Rwanda: The Troubled Course of Justice," Amnesty International noted that thousands slated for release remained in detention and some detainees were released only to be re-arrested. In the past, acquitted or released detainees experienced threats or violence upon returning to their communities. It was in this context the gacaca plan emerged.

The Gacaca Plan

According to a document released by the Rwandan government in July 1999, entitled "Gacaca Tribunals Vested With Jurisdiction over Genocide, Crimes Against Humanity and Other Violations of Human Rights which Took Place in Rwanda from 1 October 1990 to 31 December 1994," the government foresees the creation of more than 10,000 gacaca tribunals, composed of ordinary citizens, to operate in each of Rwanda's 12 *préfectures*, 145 *communes*, 1,531 *secteurs*, and 8,987 *cellules*. The current plan provides for some 180,000 citizens to sit as "judges" on the tribunals at the *cellule* level, 30,000 at the *secteur*, and 2,000 at the *commune*. According to the July 1999 gacaca document, the first stated



ICRC/Ursula Meissner

Male prisoners in Kigali, Rwanda.

goal of the new system is "to establish the truth about what happened, with the communities which were the eye witnesses of the crime giving witness about the crimes." Other goals reflect both the desire to fight impunity by punishing genocide-related crimes, and to promote national reconciliation by achieving "reintegration into society" of the guilty parties.

Gacaca tribunals will have jurisdiction over all Category 2, 3, and 4 offenses under the Genocide Law. All Category 1 cases will be forwarded to the conventional prosecutors' offices at the Courts of First Instance. The *cellule* gacaca tribunals will try suspects accused of Category 4 crimes and pass the dossiers on more serious offenders up to the next level gacaca structure. The *secteur* level gacaca will try Category 3 cases, and the *commune* level gacaca, Category 2 cases. At the *cellule* level, the entire adult population will constitute the "council" that elects the *cellule* level gacaca "court" and "coordination council." The "court" issues decisions, and the "coordination council" directs the court's activities. Thus, as members of the "council," ordinary citizens will investigate all genocide suspects in the community and will formally classify offenders according to the categories set forth in the Genocide Law. The structure of the gacaca tribunals at the *secteur*, *commune*, and *préfecture* levels will mirror that of the *cellule* level. The most grassroots *cellule* level gacaca tribunals, however, alone will exercise the key function of initial investigation and categorization of cases according to the Genocide Law.

The proposal contains no requirement of legal training for the citizen judges, or any provision for the right to counsel. In addition, refusal by citizens to testify will be a punishable offense. Although only *secteur* and *commune* level gacaca decisions may be appealed to the next-highest gacaca tribunal, the gacaca plan does not provide for review by an ordinary Rwandan court at any level.

Gacaca tribunals will be vested with all the powers of existing Rwandan courts and prosecutors' offices, including the power to summon any person to appear and testify, to issue warrants and conduct searches, to attach personal goods, and to impose sentences. Additionally, gacaca tribunals will impose sentences commensurate with the Genocide Law, including life imprisonment. Those who confess and plead guilty will be eligible for greater reductions in sentences than currently exist and may opt for substituting prison time for community service.

The Rwandan National Assembly amended Rwanda's constitution in February 2000 to create a special branch of the Supreme Court responsible for the prospective gacaca tribunals. At the time of publication, the National Assembly had not yet passed a law for-

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mally establishing the new system. Authorities, however, anticipate its establishment by mid-2001.

Human Rights Concerns

In its domestic law and through its treaty obligations under both the International Covenant on Civil and Political Rights (ICCPR) and the African [Banjul] Charter on Human and Peoples' Rights (African Charter), Rwanda has undertaken to guarantee the right to be heard before an independent and impartial judiciary, the right to counsel, and the right of the accused to examine witnesses and prepare a defense on an equal footing with the accusing parties. In its current form, the gacaca plan excludes several fundamental due process protections required by Rwandan and international law.

Domestic Provisions

The Arusha Accord of August 3, 1993 (Accord), which was integrated into Rwanda's highest source of domestic law, directly incorporates into domestic law the Universal Declaration of Human Rights (UDHR). Article 17 of the Accord states, "the principles enshrined in the Universal Declaration of Human Rights of the 10th of December, 1948 shall take precedence over corresponding principles enshrined in the Constitution of the Republic of Rwanda, especially when the latter are contrary to the former." Article 10 of the UDHR provides that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal. . . ."

In addition, Article 6 of the Accord guarantees the impartiality of the judiciary by providing that judicial powers shall be inde-

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pendent from legislative and executive powers. Furthermore, Articles 89-99 of Law No. 19/16 of August 15, 1980 (*Decret-loi portant code d'organisation et de compétences judiciaires*), require the recusal of judges having a personal interest in a case.

The Rwandan Code of Criminal Procedure (CCP) also guarantees the accused the right to counsel (Articles 75(1)), to examine prosecution witnesses and evidence (Articles 76(6) and 17(1)), and to present defense witnesses (Article 76(6)). Finally, Article 11(1) of the UDHR provides for a trial with "all the guarantees necessary for his defence."

International Standards

Rwanda acceded to the ICCPR on April 16, 1975. Article 14(1) of the ICCPR states, "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. . . ." According to Article 14(3) of the ICCPR, everyone is entitled to the following minimum guarantees: to adequate time and facilities in the preparation of his defense; to *pro se* defense or legal assistance of his own choosing; to have legal assistance assigned to him "in any case where the interests of justice so require;" and to examine, or to have examined, adverse witnesses. In addition, Article 14(5) of the ICCPR provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

Rwanda's international obligations stem not only from the ICCPR, but also from the African Charter, which it acceded to on July 15, 1983. Article 7 of the African Charter, states the right to have one's cause heard includes the right to an appeal to competent national organs when fundamental rights are violated; the right to defense, including the right to be defended by counsel of one's choice; and the right to an impartial court or tribunal. Article 26 of the African Charter requires States Parties to "guarantee the independence of the Courts."

Additionally, certain due process guarantees have been rec-

The gacaca plan does not separate the parties (including genocide victims) from the adjudicatory or prosecutorial roles. In effect, it requires every unincarcerated Rwandan adult to act as a prosecutor....

ognized as forming part of international customary law and may, therefore, be considered legally binding on all States. Scholar Theodor Meron considers the core of fair trial rights set forth in Article 14 of the ICCPR to be part of international custom. Similarly, Amnesty International and the Lawyers Committee for Human Rights assert that the fair trial rights encompassed by Articles 10 and 11 of the UDHR are widely viewed as part of international customary law.

Several other relevant sets of non-binding but authoritative standards also apply. Principle 5 of the UN Basic Principles on the Independence of the Judiciary (Judiciary Principles) declares, "[e]veryone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals." Principle 3 states, "[t]he judiciary shall have jurisdiction over all issues of a judicial nature;" and Principle 10 requires that "[p]ersons selected for judicial office . . . be individuals of integrity and ability with appropriate training or qualifications in law."

Furthermore, Principle 1 of the UN Basic Principles on the Role of Lawyers states, "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." Also, Guideline 10 of the Guidelines on the Role of Prosecutors (Prosecutor Guidelines) separates the prosecutorial role from that of judges: "the office of prosecutors shall be strictly separated from judicial functions."

Finally, in 1992 the African Commission on Human and Peoples' Rights (African Commission) adopted the Resolution on the Right to Recourse Procedure and Fair Trial, reinforcing Article 7(1) of the African Charter by guaranteeing, *inter alia*, the right to adequate preparation of the defense and the right to examine witnesses.

Right to Be Tried by a Competent, Independent, and Impartial Tribunal

The gacaca plan was admittedly conceived as a political strategy. Its very nature raises immediate independence and impartiality concerns. At issue is whether the gacaca tribunals constitute "independent and impartial" tribunals as required by Article 14(1) of the ICCPR and by Articles 7(1) and 26 of the African Charter.

The gacaca plan does not separate the parties (including genocide victims) from the adjudicatory or prosecutorial roles. In effect, it requires every unincarcerated Rwandan adult to act as a prosecutor, in that every resident serves on the *cellule* level gacaca council, gathering evidence and classifying cases under the

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Genocide Law. This directly contravenes Guideline 10 of the Prosecutor Guidelines, which specifies that those officials responsible for the prosecution of offenses be entirely autonomous from the judicial decision-makers.

The gacaca plan's use of large numbers of untrained lay judges also threatens the right to an impartial and independent judiciary. The UN Human Rights Committee (HRC) noted insufficient judicial training and experience might jeopardize fair trial rights under Article 14 of the ICCPR. Judiciary Principles 10 and 13 indicate judges should be selected based on high levels of legal training and experience, as well as high moral integrity. Although proposed gacaca judges must be "persons of integrity," the sheer number of judges involved—approximately one percent of the population—casts doubt on the possibility of ensuring this. The African Commission, interpreting the African Charter, held that the mere composition of a particular special tribunal, regardless of the individual character of its members, might be invalid where it "creates the appearance, if not the actual lack of impartiality."

Right to Counsel and to Call and Examine Witnesses

The gacaca plan does not provide for the participation of counsel at any stage of the proceedings. The right affected here is not so much the right to appointed counsel, but a defendant's right to *access* a lawyer—even one supplied by an international NGO, such as Lawyers without Borders, which provides defense counsel in the current system. The right of defendants to call upon a lawyer of their choice to protect their interests and to help defend them against charges is guaranteed under ICCPR Article 14(3)(b) and (d) and African Charter Article 7(1)(c). The HRC's interpretation of ICCPR 14(3)(d) systematically reinforced the notion that every defendant may make use of defense counsel. This right is a central feature of the principle of equality of arms, which ensures the defense will have a reasonable opportunity to prepare its case on an equal footing with the prosecution.

The gacaca plan, however, does not provide defendants the same legal powers as the prosecution. The gacaca plan does not allow defendants either to present defense witnesses or to examine prosecution witnesses. While international treaty law does not guarantee an absolute right to present defense witnesses, Article 14(3)(e) of the ICCPR does require defendants be granted the same legal powers of summoning and cross-examining witnesses as the prosecution. Additionally, the gacaca plan allocates investigatory resources to the gacaca councils to prepare and classify the cases against the accused. Moreover, the prosecution will have access to witnesses for evidentiary purposes, while the accused will not. Even though the principle of equality of arms requires defendants to be accorded access to their case files and sufficient time to prepare their defense, the gacaca plan also omits these aspects.

Right to Review by a Higher Tribunal

The above procedural deficiencies will, in turn, affect the right to review by a higher tribunal, as guaranteed by Article 14(5) of the ICCPR. At no point does the gacaca plan allow for a case review by an ordinary Rwandan court; rather, the gacaca tribunals themselves will issue final and binding decisions. The plan provides for one appeal (for all but Category 4 offenses), but only before another gacaca tribunal. Article 14(5) of the ICCPR, however, requires the reviewing tribunal meet all fair trial guarantees in ICCPR Article 14. If the gacaca tribunals do not provide the requisite independence, impartiality, and defense protections, then they cannot fulfill the requirements of a proper forum for review.

Due Process Standards

It is arguable that the proposed gacaca system—based on an extra-judicial conflict resolution mechanism—is not subject to all the due process standards governing ordinary trials, despite the fact that it incorporates many features of an ordinary criminal justice system (including lengthy criminal sentences and supervision by a branch of the Supreme Court). No matter how the gacaca system is characterized, however, it is subject to the fundamental due process guarantees to which Rwanda is bound under the ICCPR and the African Charter.

The HRC has stated that trials of civilians before special tribunals should take place under conditions that ensure the guarantees provided in Article 14 of the ICCPR are met. Although non-binding, the Judiciary Principles go further, prohibiting the creation of special tribunals to displace the right to appear before an ordinary court. The African Commission has specifically addressed the necessity for procedural protections in the context of traditional justice mechanisms; its Dakar Declaration of September 11, 1999, states, "[i]t is recognized that traditional [i.e., gacaca] courts are capable of playing a role in the achievement of peaceful societies and exercise authority over a significant proportion of the population of African countries. These courts, however, also have serious shortcomings, which result in many instances of the denial of a fair trial. Traditional courts are not exempt from the provisions of the African Charter relating to a fair trial."

Is This Really Gacaca?

The new gacaca plan bears little resemblance to the traditional practice of gacaca. According to anthropologist Stef Vandeginste, in a 1999 paper entitled "Justice, Reconciliation and Reparation After Genocide and Crimes Against Humanity," traditional gacaca was a phenomenon rooted in society, the function of which was to restore social order and harmony in the community. A gacaca proceeding was not a permanent juridical or administrative institution but a meeting chaired by elders and convened when necessary. The elders guided the group discussion, which was designed to lead to an arrangement acceptable to all participants. The modern distinction between judges, parties, and witnesses was not relevant in traditional gacaca; as the issue affected all of the members of the society, they were all "parties" to the conflict. The traditional gacaca proceeding did not aim to determine guilt, but rather the purpose was to make the community whole. The disputes handled in traditional gacaca proceedings generally concerned land, marriage, inheritance, livestock, damage to property, and petty theft. Major conflicts, such as more serious offenses of theft and murder, were not dealt with by gacaca, but were put before the *mwami* (king). Even where the dispute was of a criminal nature, gacaca settlements would generally require compensation of some sort rather than prison sentences.

The new gacaca plan proposed by the Rwandan government adopts some of the core values of the traditional gacaca proceedings; for example, it aims to increase community participation, and to promote reconciliation and harmony. Whereas traditional gacaca derived its authority from the common understanding of the community, the new plan would be imposed by the State. Additionally, while traditional gacaca did not handle serious criminal matters and could not impose prison sentences, the new plan deals with genocide and potential life sentences. Decisions by the new gacaca tribunals will not be based on compromise, and penalties will necessarily involve retributive punishment.

Conclusion

The sheer number of suspects and the particularly atrocious nature of the crimes committed during the 1994 genocide in Rwanda have placed an enormous burden on the country's resource-strapped justice system, one which any society would have trouble

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body of a U.S. trade agreement itself, key provisions that reconfirm that free trade and the protection of the environment and of the rights of workers go hand-in-hand. It will not require either country to adopt new laws, but rather requires each to enforce the laws it currently has, which will join free trade and open markets with other public responsibilities.” The U.S.-Jordan Agreement moves beyond NAFTA by incorporating labor issues into the main text of the free trade agreement and utilizes the same dispute resolution and enforcement mechanism for labor disputes as is used for the agreement’s commercial terms.

Although it is significant that investment disputes are not privileged over labor disputes, the U.S.-Jordan Agreement nonetheless has significant weaknesses. Most strikingly, the Agreement does not permit private parties to challenge violations of the labor provisions. Rather, it forces them to rely on State Parties to challenge such violations. Lastly, the Agreement does not create explicit sanctions for violations of the labor provisions.

Improving the FTAA

Theoretically, the NAFTA labor side agreement creates a useful model by providing a private right of action and a transparent procedure. In practice, however, the lack of an enforceable remedy means that the NAALC is ineffective in protecting workers’ rights. The U.S.-Jordan Agreement, while a step forward in elevating labor concerns to the same level as commercial concerns, does not go far enough in developing enforceable labor protections and limits access to the dispute resolution mechanism to the State Parties themselves. An effective model for the FTAA would draw on strengths of these previous free trade agreements and leave behind the weaknesses of non-enforceability. These agreements, however, are not the only possible models for the FTAA.

The International Labor Rights Fund has summarized the various proposals by numerous NGO’s on how to effectively incorporate labor rights into free trade agreements. These proposals move beyond the requirements under NAFTA and the U.S.-Jordan Agreement that nations simply enforce their own laws. The following principles are outlined in the proposals: compliance with a social clause outlining workers’ rights as a condition to participate in the trade agreement; participation in a process to harmonize labor laws upward with each nation agreeing to enforce its own laws as a starting point; a requirement that multinational companies operating within the free trade area comply with the terms of the social clause; and enforcement pro-

visions for violations of the social clause by a member country and/or a company operating within a member country. These remedies could take the form of labor sanctions or monetary penalties. These proposals would mean that not only are the ILO core workers’ rights respected but that nations would work toward securing the broader economic rights advocated by the UDHR, such as the living wage.

The Need for Meaningful Participation

This basic set of principles is just the start of developing a workable proposal for how to effectively address human rights and labor concerns. These improvements should come from a more transparent process with a genuine incorporation of a broader spectrum of interests than simply corporate interests. These suggestions should not be compiled by the Civil Society Committee and ignored, but must be integrated into the actual negotiations. The public must have access to the negotiating documents in order to have a useful role in the integration of labor protections into the FTAA. If there is not meaningful participation in the development of the FTAA, the public must at least have a meaningful say in whether their nation should join or reject the FTAA.

Conclusion

At the Third Summit of the Americas in Quebec, the negotiators must take heed and listen to the thousands of protestors who gathered outside of the event advocating for greater public participation in the FTAA negotiating process and a more significant focus on equity concerns. Only through a more open and transparent process will it be possible to develop alternative models for the FTAA, models that help foster rather than degrade the protection of human rights. While the FTAA negotiations are focused on increasing economic prosperity through free trade, the focus of these negotiations should not be in isolation from the other enumerated goals of the Miami Summit, which include the eradication of poverty. Economic prosperity cannot be achieved simply through opening markets, but must be accompanied by appropriate government involvement to ensure that greater equity comes with greater prosperity. One important way of achieving this goal is by incorporating meaningful mechanisms into the FTAA to ensure that core workers’ rights are recognized and enforced. ☺

**Sheryl Dickey is a J.D. candidate at the Washington College of Law and an articles editor for the Human Rights Brief.*

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shouldering. The gacaca plan, however, is not the only possibility for improvement. Its conception of unchecked popular participation in the prosecution and judging of defendants jeopardizes key guarantees of judicial independence and impartiality, and its denial of the assistance of counsel and other procedural rights compromises human rights protections at the heart of a fair trial.

Furthermore, the gacaca plan may not meet its own stated goals. The increase in popular participation may not correspond to an increase in perceived legitimacy of process because the new plan does not resemble the traditional gacaca practice in critical ways. Some observers also doubt the gacaca system would provide the promised increased rate of adjudications: the selection and training of so many lay judges poses enormous logistical challenges, and the proposal has already been delayed over one year

beyond its original starting date. According to Amnesty International’s April 2000 report, the gacaca plan’s notion of forced testimony in highly public proceedings also increases the risk of false testimony. These shortcomings are all the more serious given the current acquittal rate of 20 percent in ordinary trials.

In order to avoid trading one system for a more harmful one, Rwanda should take steps to safeguard the independence and impartiality of the gacaca plan, allow for access to counsel and for a meaningful opportunity to prepare a defense, and provide the possibility for review before an ordinary court. ☺

**Leah Werchick is a J.D. candidate at the Washington College of Law. She worked with the UN Office of the High Commissioner for Human Rights in Rwanda from 1996 to 1998.*